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No. 82-122

# In the Supreme Court of the United States

OCTOBER TERM, 1982

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CENTURY AIR FREIGHT, INC., PETITIONER

*v.*

CIVIL AERONAUTICS BOARD

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## MEMORANDUM FOR THE CIVIL AERONAUTICS BOARD IN OPPOSITION

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Petitioner contends that the Civil Aeronautics Board erred in approving the terms of a settlement of an enforcement proceeding concerning the allocation of reserved container space on American Airlines' now-discontinued overnight cargo flight from New York City to San Juan, Puerto Rico.

1.a. From 1971 until August 1, 1981, American Airlines operated an all-cargo flight each night from New York to San Juan, Puerto Rico. The flight was attractive to air freight forwarders, such as peti-

tioner, because it provided them with next-morning delivery in San Juan. Accordingly, there was insufficient space on the flight to satisfy the demand. By the end of 1971, American had allocated all 12 of the available container positions. As a result, petitioner was unsuccessful at that time and in succeeding years in obtaining space on the flight, although it subsequently did obtain one container position in 1977 (Pet. App. 54-55). In 1977, petitioner filed suit against American in the United States District Court for the Southern District of New York seeking damages and injunctive relief for alleged violations of the antitrust laws and the Federal Aviation Act in connection with the allocation of container space. *Century Air Freight* v. *American Airlines*, No. 77 Civ. 2195 (S.D.N.Y.). The parties agreed that the matter would be referred to the Civil Aeronautics Board in accordance with the doctrine of primary jurisdiction, and the district court stayed further proceedings pending such referral (Pet. App. 55-56).

b. The Board has discretionary authority under Sections 411 and 1002(a) of the Federal Aviation Act of 1958, 49 U.S.C. 1381 and 1482(a), to institute a formal investigation into alleged violations of the Act when it finds such an investigation warranted by the public interest. Violations of the antitrust laws may be treated as unfair methods of competition subject to the Board's jurisdiction under Section 411. See *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 303-307 (1963).

In this case, after an informal investigation, the Board's Bureau of Compliance and Consumer Protection concluded that American's allocation practices appeared to constitute an unjust discrimination proscribed by Section 404(b) of the Act, 49 U.S.C.

1374(b), and an unfair method of competition proscribed by Section 411, 49 U.S.C. 1381. The Bureau determined, however, that a proceeding should be instituted only on the unjust discrimination issue, because resolution of the unfair competition issue was not deemed necessary to protect the public interest. Rather than dismiss petitioner's antitrust claims outright, however, the Bureau offered petitioner a choice: (1) it could file a formal complaint with the Board and prosecute the antitrust issues without active assistance from the Bureau, or (2) upon completion of the Board proceedings on the unjust discrimination issue, petitioner could renew its antitrust action in the district court. Petitioner elected the latter alternative (Pet. App. 42-43).

c. Before the hearing began on the unjust discrimination issue, the Bureau and American reached a settlement agreement, under which American was required to pay $50,000 in civil penalties, alter its allocation practices for the flight, and comply with the prohibtion in Section 404(b) of the Act against unjust discrimination. The settlement required American to limit the duration of all reservations on its overnight cargo flight to San Juan to one year and to consider applications each year from all freight forwarders and shippers under essentially the same criteria. All shippers who tendered shipments for the northbound flight from San Juan to New York were to be guaranteed at least one reserved southbound position, and the remaining positions were to be allocated according to such factors as the applicant's financial stability and credit record, the type of shipments, and other matters that might bear on revenue and costs (Pet. App. 40-41, 43, 50-51, 57). The Administrative Law Judge (ALJ) approved the settlement, concluding that the agreed-upon allocation

system would "provide a fair resolution of the particular case" because it "addresses whatever effects American's practice might have had on the route, guarantees a fair opportunity to all shippers to compete for access to American's service, and is also tailored to meet American's legitimate business needs" (Pet. App. 57).

The Board affirmed the ALJ's consent order. The Board observed that because there was excess demand for reserved container positions, "American obviously must use some method of allocating the available positions among the shippers requesting them" (Pet. App. 44). The method of allocation agreed to by American and the Bureau was, in the Board's view, fair (*ibid.*). The Board rejected petitioner's contention that the settlement gave American unlimited discretion in allocating space, noting that the allocation system did not authorize American to select customers unlawfully or improperly and placed substantial limitations on American's discretion in order to ensure against unjust discrimination. The Board also stated that petitioner had not explained how the allocation system would injure it or "suggested any alternative means of allocating container positions which would be both fair and practicable" (Pet. App. 45). The court of appeals affirmed the Board's decision by memorandum order (Pet. App. 38).

2. This case, especially in its current posture, presents no issue warranting review by this Court.

a. The allocation system set forth in the consent order applied only if American chose to continue overnight cargo service from New York to San Juan (Pet. App. 49 & n.2; 57-58). As petitioner notes (Pet. 21), American discontinued its overnight cargo flight from New York to San Juan on August 1, 1981, and petitioner has not pointed to any evidence indi-

cating that American intends to renew such service prior to December 31, 1984, the date on which the allocation requirement terminates (Pet. App. 49, 57). This case therefore would appear to be moot. See, *e.g.*, *Murphy* v. *Hunt*, No. 80-2165 (Mar. 2, 1982); *Weinstein* v. *Bradford*, 423 U.S. 147 (1975); *SEC* v. *Medical Committee for Human Rights*, 404 U.S. 403 (1972).

b. Quite aside from its apparent mootness, this case is not an appropriate vehicle in which to resolve the statutory issues raised by petitioner concerning a carrier's obligation to treat shippers equally, because the Board, in the order under review, merely approved a settlement reached before any hearing was held in the Board proceeding. The statutory issues accordingly were not fully litigated below. Moreover, "where Congress has entrusted an administrative agency with the responsibility of selecting the means of achieving the statutory policy 'the relation of remedy to policy is peculiarly a matter for administrative competence.'" *American Power & Light Co.* v. *SEC*, 329 U.S. 90, 112 (1946), quoting *Phelps Dodge Corp.* v. *NLRB*, 313 U.S. 177, 194 (1941). Accord *Butz* v. *Glover Livestock Commission Co.*, 411 U.S. 182 (1973); *Commonwealth of Virginia* v. *CAB*, 498 F.2d 129, 134 (4th Cir.), cert. denied, 419 U.S. 1048 (1974). Whether the Board abused its discretion in approving the particular settlement at issue in order to achieve the purposes of the statutory prohibition against unjust discrimination does not warrant review by this Court.

c. In addition, although airlines do have a statutory duty to treat shippers equally, petitioner is mistaken in asserting (Pet. 23-31) that this duty derives from Section 1002(k) of the Act, 49 U.S.C. (Supp. IV) 1482(k). American's duty not to engage in

unjust discrimination derives instead from Section 404(b), and the settlement expressly requires American to comply with that Section (Pet. App. 58). In contrast, Section 1002(k) does no more than define, for purposes unrelated to the issues here, the term "interstate air transportation of property." Prior to 1977, there had been no difference between the Board's jurisdiction over domestic passenger fares and its jurisdiction over domestic cargo rates. As part of the deregulation of airlines, the Board's jurisdiction over cargo rates was for the most part eliminated. The definition of "interstate air transportation of property" in Section 1002(k) therefore was added in 1977 for the purpose of defining the kind of rates that thereafter would be free of the Board's traditional rate jurisdiction. See Pub. L. No. 95-163, Section 18(e)(1), 91 Stat. 1287; H.R. Rep. No. 95-773, 95th Cong., 1st Sess. 14 (1977). Petitioner thus clearly errs in contending that Section 1002(k) was intended to impose new duties on carriers.[1]

d. Petitioner's claim (Pet. 31-35) that the Board was required to investigate its antitrust allegations misconstrues the nature of the Board's duty to investigate complaints that a carrier has violated the Act. The courts have held that where, as here, the Board acts pursuant to its duty under Sections 411 and 1002(a), 49 U.S.C. 1381 and 1482(a), to investigate allegations of unlawful conduct, the Board has the discretion to dismiss a complaint on a finding

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[1] Section 404(a), 49 U.S.C. (Supp. IV) 1374(a), imposes on airlines the traditional common carrier duty of providing transportation "upon reasonable request therefor * * *." The Board, however, has exempted carriers from that duty with respect to domestic cargo transportation. 14 C.F.R. 291.30-291.35. See *National Small Shipments Traffic Conference, Inc.* v. *CAB*, 618 F.2d 819, 831-832 (D.C. Cir. 1980).

that a formal investigation would not be in the public interest. *Flying Tiger Line, Inc.* v. *CAB*, 350 F.2d 462, 465 (D.C. Cir. 1965) (Burger, J.), cert. denied, 385 U.S. 945 (1966); *Flight Engineers International Association* v. *CAB*, 332 F.2d 312, 314-315 (D.C. Cir. 1964); *Trailways of New England, Inc.* v. *CAB*, 412 F.2d 926, 930-932 (1st Cir. 1969). The Board's powers under these sections are to be used to protect public, not private interests. *American Airlines, Inc.* v. *North American Airlines, Inc.*, 351 U.S. 79, 83 (1956). In this case, of course, petitioner never even filed a formal complaint with the Board and chose instead to reserve its antitrust claim for trial in the district court. In these circumstances, the Board acted well within its discretion in declining to resolve those issues. As the court of appeals observed (Pet. App. 38), the Board's order did not intimate any view on whether American's conduct between 1971 and 1981 violated the antitrust laws, and the settlement and the Board's approval of it have no bearing on petitioner's antitrust suit, which petitioner is free to pursue (*id.* at 45, 46-47).

It therefore is respectfully submitted that the petition for a writ of certiorari should be denied.

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